FILE COPY

APR 3

Supreme Court of the United States

No. 677, October Term, 1932.

The United States of America, on Relation of Lucien H. Greathouse and Rebekah S. Greathouse, *Petitioners*,

v.

George H. Dern, as Secretary of War, and Lytle Brown, as Chief of Engineers.

Certiorari to the Court of Appeals of the District of Columbia.

BRIEF FOR PETITIONER.

J. Harry Covington,
John Marshall,
Spencer Gordon,
Attorneys for Petitioners.

Press of Byron S. Adams, Washington, D. C.

INDEX

	Page
Brief for petitioner	1
Report of opinion below	1
Jurisdiction	1
Statement of the case	2
Specification of errors to be urged	9
Summary of argument	9
Argument	10
I. The Secretary of War may not refuse to issue a permit for a wharf by reason of matters not relating to navigation	10
II. The owner of land bordering the Potomac River in Virginia opposite the District of Columbia has the right to build a wharf if it does not obstruct or injure the navigation of the river	15
A. At common law	16
B. By the Compact of 1785	20
III. The relators as the owners of land in Virginia bordering on the Potomac River may maintain this action	23
Conclusion	26

CITATIONS

Cases:	
Baltimore & Ohio R. R. Co. v. Chase, 43 Md. 23, 34	19
Coyne v. Prichard, 272 Pa. 424	15
Empire Home Furnishers v. White, 256 N. Y. S. 451, 145 Misc. Rep. 285	15
Evans v. United States, 31 App. D. C. 544	23
Gibbons v. Ogden, 9 Wheat. 1	11
Jackman v. Public Service Commission, 121 Kan. 141	15
Kansas v. Colorado, 206 U. S. 46	11
Marbury v. Madison, 1 Cranch 137	15
Marine Railway Company v. United States, 257 U. S. 47	16, 23
Maryland v. West Virginia, 217 U. S. 577	23
New York v. Department of Health, 226 N. Y. 209	15
Nicodemus v. State, 82 Okla. 152	15
Norfolk City v. Cooke, 27 Grat. 430	19
People v. Robinson, 126 N. Y. S. 546, 141 App. Div. 656	15
Shively v. Bowlby, 152 U. S. 1	16, 24
Smoot Sand & Gravel Corporation v. Washington Airport, Inc., 283 U. S. 348	16, 23
State v. Mayor, 94 W. Va. 189	15
United States v. River Rouge Co., 269 U. S. 411, 418	18
Wright v. France, 279 Pa. St. 22	15

Page

Statutes:
Compact of 1785 and Maryland Act of Ratification, Maryland Laws, Kilty, Vol. 2, Nov. 1785, Chap. 1 ..... 8, 20, 21
Virginia Act of 1785 Ratifying Compact of 1785, 12 Hening, Va. Stat., p. 50 21
Maryland Act of Cession, Maryland Laws, Kilty, Vol. 2, November, 1791, Chap. 45, Sec. 2 21
Virginia Act of Cession, 13 Hening, Va. Stat., p. 44, Sec. 2..... 21
Organic Act of the District of Columbia of 1801, 2 Stat. 103, D. C. Code, p. 449 ..... 21, 22
Act of Recession to Virginia of 1846, 9 Stat. 35 22
Rivers and Harbors Act of March 3, 1899, 30 Stat. 1151, also contained in 33 U. S. C., Sec. 403 ..... 8, 9, 10
Judicial Code, Section 240 (a) as amended by Act of February 13, 1925, 43 Stat. 936 1
Crampton Act, Act of May 29, 1930, 46 Stat. 482..... 5, 12, 13

Other References:
40 L. R. A. 635 18
Maryland, by William Hand Browne, pp. 159, 160 17
27 Opinions Atty. Gen. 284 14
Pomeroy's Equity Jurisprudence, 4th Ed., Vol. 1, Secs. 105, 368.... 25
Potomac Landings, by Paul Wilstach, pp. 3, 9, 10..... 17, 18
Story's Equity Jurisprudence, 14th Ed., Vol. 3, Sec. 1612..... 25
Virginia, by John Esten Cooke, p. 371 17

Supreme Court of the United States

No. 677, October Term, 1932.

The United States of America, on Relation of Lucien H. Greathouse and Rebekah S. Greathouse, *Petitioners*,

v.

George H. Dern, as Secretary of War, and Lytle Brown, as Chief of Engineers.

Certiorari to the Court of Appeals of the District of Columbia.

BRIEF FOR PETITIONER.

Report of Opinion Below.

The opinion of the Court of Appeals (Rec. p. 63) is reported in 61 W. L. R. 106.

Jurisdiction.

This case is on certiorari to the Court of Appeals of the District of Columbia under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat.

936. The judgment of the Court of Appeals was entered January 16, 1933 (R. 83). The petition for certiorari was filed in this Court February 9, 1933, and the writ was granted March 13, 1933.

Statement of the Case.

This is an application for the writ of mandamus to compel the Secretary of War to issue a permit for the construction of a wharf in the Potomac River from and in front of land owned by the relators on the Virginia shore opposite the District of Columbia, a short distance above Key Bridge. *It has been stipulated that the proposed wharf will not obstruct navigation* (R. 38).

In 1929, Charles H. Greathouse was in possession of the land in question, and held title under a deed from Augustus S. Worthington, dated December 13, 1921 (R. 39). Worthington had acquired the property from Henry H. Wells by deed dated June 16, 1892 (R. 39). The early surveys showed the land as bounded on the north by the Potomac River with an old chestnut tree on the River bank, but as the years went on the soil was extended northward by gradual accretion (R. 48 and plats following R. 58). The descriptions in the deeds to Worthington and Greathouse began with the chestnut tree, but included "all accretions, land and other riparian rights pertaining to any of the land herein described and binding on the Potomac River" (R. 39, 40).

By contract dated June 24, 1929, Charles H. Greathouse agreed to sell this land to the Sun Oil Company (R. 41). The purchase price was to be $40,000, and the purchase was to be contingent upon—

> "the issuance by the authorities of the Federal Government of such permits as are legally necessary for the construction of requisite wharves, piers, pipe lines and moorings out from and in front of said property into and in the Potomac River for the loading and unloading of tank barges and like vessels."

Charles H. Greathouse agreed in this contract that, upon receipt of plans from Sun Oil Company, he would make application for the permit "at his own option, either in his name or in the name of Sun". By its terms the contract was to expire December 31, 1929.

In October, 1929, application was made as follows:

> "District Engineer's Office,
> United States Army,
> Washington, D. C.
> "Gentlemen:
>
> "We request a permit for the construction of a wharf and fender piles as shown on the attached plan, to be built in the Potomac River approximately 400 yards above the Key Bridge at Rosslyn, Virginia. We own the land in front of which the wharf will be built.
>
> "Very truly yours,
> "SUN OIL COMPANY,
> "By J. N. Pew, Jr.,
> Vice-President." (R. 46, 47).

May 9, 1930, the Chief of Engineers held a public hearing to consider this application (R. 45), and under date of August 7, 1930, Major General Lytle Brown, Chief of Engineers, reported to the Secretary of War:

> "3. * * * there has not been a single objection to the construction of the wharf from the standpoint of navigation * * *.
>
> "4. * * * The Sun Oil Company has secured all the authority that is necessary to build its establishment on the shore in Virginia.
>
> "5. This application has been before this Department since October, 1929, during which time it has been given very careful consideration. The data submitted by both proponents and opponents have been thoroughly studied and after mature deliberation I have come to the conclusion that my power under the existing law, Section 10 of the River and Harbor Act of March 3, 1899, precludes me from taking into consideration the objections raised by the opponents with a

view to withholding approval of the application solely upon the grounds of such objections. Further delay on my part would be an abuse of my authority and a deprivation of the rights of citizens under the law. The prevention of the proposed development in the interest of the beautification of the National Capital and its environs is a matter to be determined by other agencies.

"6. I therefore recommend that the construction of the wharf be authorized in accordance with the provisions of the aforementioned Section 10, subject to the conditions in draft of instrument which I have signed." (R. 45, 46, 47)

The Chief of Engineers prepared a permit for the construction of the wharf, signed it, and sent it with his report to Patrick J. Hurley, the Secretary of War. (R. 47).

August 15, 1930, this recommendation was "returned to the Chief of Engineers without approval of Sec. War" (R. 47). After further consideration, by letter of August 27, 1930, to Mr. J. Edgar Pew of the Sun Oil Company, the Secretary stated:

"The building program, the beautification of the Potomac River and its environs, and the acquisition of park land have in part already received the sanction of Congress. It is no longer merely an executive program. It is a policy of the Government. After having gone into the matter fully with yourself and your representative, and with Col. Ulysses Grant III, the Chairman of the National Park & Planning Commission, I have concluded that the development contemplated by you interferes with a public policy." (R. 18).

At the opening of the case in the trial court it was stipulated:

"that the construction of the wharf, fender piles, etc., as applied for * * * will not obstruct navigation, and * * * the decision of the Secretary of War declining to authorize such construction was not by reason of any

matter connected with navigation, but that *the only thing that the Secretary had in mind was that the project was against public policy and particularly opposed to the program contemplated by the Crampton Act and the proposed George Washington Memorial Parkway.*" (R. 38, italics ours.)

This program contemplated, *at some time in the uncertain future,* the acquisition for park purposes of lands along the Virginia shore of the Potomac River. (See Crampton Act, 46 Stat. 482, discussed in this brief at page 12.) While the application for the wharf permit had been under consideration, the Director of the National Park and Planning Commission had urged the Secretary of War to refuse to issue it, pointing out that if the wharf permit were granted the Sun Oil Company would take the property and would build tanks thereon, and that this would increase the amount that the Government would have to pay for the property when it was condemned, whereas if the wharf permit were refused, the Sun Oil Company would not take the property and would not build tanks, the result of which would be that when the Government ultimately acquired the property by condemnation it would not have to pay so much for it (R. 53, 54).

While the application was pending Charles H. Greathouse conveyed the land to his son and daughter-in-law, who are the relators (R. 39, 42, 43), and the original contract with the Sun Oil Company was extended by successive contracts, the last of which was dated August 1, 1930, between the relators Lucien H. Greathouse and Rebekah S. Greathouse and Sun Oil Company, provided in effect that the purchase of the property should be conditioned upon the granting of the wharf permit within three years after April 30, 1933 (R. 41, 42).* The Greathouses agreed to

*Sun Oil may withdraw from this contract by ninety days notice prior to the end of any yearly period after April 30, 1933, but unless it does so, is obligated to purchase the property if the permit has been granted (see provision (c) R. 42). The record does not indicate that such notice has been given, and in fact it has not.

make every reasonable effort to obtain the permit "by prosecuting to the courts of last resort, if necessary" (R. 42).

September 30, 1930, the petition for mandamus was filed against Patrick J. Hurley, as Secretary of War, and Lytle Brown, as Chief of Engineers (R. 2). General Brown answered briefly:

> "That the respondent * * * found that the proposed structure would not obstruct navigation in the waters of the Potomac River, and on, to wit, August 7, 1930, recommended the approval of the plans as set forth in the petition. The respondent has done all that the law requires him to do, and is without power to do anything further." (R. 12).

The defendant Patrick J. Hurley, as Secretary of War, filed an answer saying in effect that he was justified in declining to issue the permit, and praying that the petition be dismissed.

At a meeting of the National Capital Park and Planning Commission held September 25, 1931, (approximately one year after the petition for mandamus was filed), a resolution was adopted reciting that the Commission was authorized to occupy lands belonging to the United States necessary for development as parks, that the United States was the owner of certain land described in the resolution, including the part of the land involved in this suit immediately adjacent to the river. The resolution declared that

> "* * * this Commission * * * does hereby take possession of, and occupy, the said lands hereinafter described by actual survey which will include to center of the line of channel of the Potomac River in the District of Columbia, for the various purposes and intents as set forth in the said Act of Congress, and that such possession and occupation thus referred to, be complete and exclusive, and that a copy hereof be posted upon each of the group parcels of land hereinafter described." (R. 52).

Thereafter a representative of the Commission posted some copies of this resolution on stakes which were driven in the ground on the Greathouse property. These stakes were about 75 or 100 feet from the present shore line of the Potomac River, and "were placed there. . . .as being on the high water line of the Potomac River of 1863." (R. 56).*

The case was tried in the Supreme Court of the District of Columbia before Mr. Justice Luhring beginning January 25, 1932, (R. 38). March 24, 1932, an order was entered dismissing the petition, from which the petitioners appealed (R. 35). October 4, 1932, the case was first argued in the Court of Appeals. (R. 62). November 19, 1932, it was ordered restored to the calendar for rehearing. (R. 62). December 5, 1932, it was reargued (R. 62). January 16, 1933, the Court of Appeals entered an order affirming the decision of the Supreme Court of the District of Columbia, Mr. Justice Groner and Mr. Justice Hitz dissenting. (R. 83).

The grounds of this decision as stated in the majority opinion were:

1. The owner of lands in Virginia opposite the District of Columbia has no right to build a wharf into the Potomac River even though such wharf will not obstruct navigation.

2. In determining whether or not to issue a wharf permit the Secretary of War has "unlimited discretionary jurisdiction," and may take into consideration matters not connected with navigation.

3. Relators' rights are "conditional, contingent, prospective and inchoate," for the enforcement of which mandamus will not lie.

The dissenting opinion took the following view which we shall urge is the correct one:

*We do not think that this action had any effect on the rights of the parties, and mention it only so that our statement of facts will be complete. It is discussed herein at page 22.

1. The owner of lands in Virginia opposite the District of Columbia has the right to build a wharf into the Potomac, subject only to the condition that the same is not detrimental to the public interest in the navigation of the river. This is a property right expressly recognized by the Compact of 1785 between Maryland and Virginia which provided:

> "Seventh, The citizens of each state respectively shall have full property in the shores of Patowmack River adjoining their lands, with all emoluments and advantages thereunto belonging, and the privilege of making and carrying out wharfs and other improvements, so as not to obstruct or injure the navigation of the river. * * *" *Maryland Laws*, Kilty Vol. 2, Nov. 1785, Chap. 1.

2. The only discretion conferred upon the Secretary of War by the Rivers and Harbors Act is in determining whether the proposed construction will obstruct navigation. When the Secretary finds that the wharf will not obstruct navigation, the discretion which the act confers is exhausted and the Secretary may not resort to another ground as the basis of a refusal to issue the permit.

3. "Appellants' property is useful only for wharf purposes, but that use gives it value. Without the permit the value is lost, and unless redress can be afforded here, it can be found nowhere else. The case is peculiarly one in which the writ should issue." (R. 82).

A petition for certiorari to this Court was filed February 9, 1933, and the writ was granted March 13, 1933.

March 27, 1933, George H. Dern, as Secretary of War, was substituted as one of the defendants in the place of Patrick J. Hurley.

Specification of Errors to be Urged.

The Court of Appeals of the District of Columbia erred:

1. In failing to hold that an owner of lands bordering the Potomac in Virginia opposite the District of Columbia has the right to build a wharf if it does not obstruct or injure the navigation of the river.

2. In holding that the Secretary of War may refuse to issue a permit for a wharf by reason of matters other than those relating to navigation.

3. In holding that mandamus will not lie for the enforcement of the relators' rights.

Summary of Argument.

The Secretary of War may not refuse to issue a permit for a wharf by reason of matters not relating to navigation.

The owner of land bordering the Potomac River in Virginia opposite the District of Columbia has the right to build a wharf if it does not obstruct or injure the navigation of the river. This right exists (a) by the common law of Maryland and Virginia, and (b) by the Compact of 1785 between Maryland and Virginia.

The relators, as the owners of land in Virginia bordering on the Potomac River, may maintain this action.

Argument.

I. The Secretary of War may not refuse to issue a permit for a wharf by reason of matters not relating to navigation.

The statute under which the Secretary of War acted is part of the Rivers and Harbors Act of March 3, 1899, 30

Stat. 1151, and is also contained in 33 U. S. C., Sec. 403, where it is entitled "Obstruction of navigable waters generally; wharves; piers, etc.; excavations and filling in," as follows:

> "The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established,* except on plans recommended by the Chief of Engineers and authorized by the Secretary of War; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War prior to beginning the same."

The substantive law of this act is contained in the first clause:

> "The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited."

The rest of the section is directory, entrusting its administration to the Chief of Engineers and the Secretary of War.

We recognize, of course, that there is a discretion confided to the Chief of Enginers and to the Secretary of War by this statute. If they find that a proposed construction

*No harbor lines have been established where the wharf is proposed (R. 15).

will obstruct navigation, that is the end of the matter unless it can be shown that the decision has no reasonable basis and is clearly arbitrary. But the discretion confided to these officials by the act is clearly a discretion only in regard to determining whether or not the proposed construction will in fact obstruct navigation. This is clear from:

> (a) The language of the act. It prohibits only the creation of obstructions to the navigable capacity of any of the waters of the United States.
>
> (b) The constitutional basis of the act. The act is not local to the District of Columbia, but is applicable throughout the United States wherever there are navigable waters. Congress derives its power to enact such legislation only from the commerce clause of the Constitution. *Gibbons v. Ogden*, 9 Wheat. 1; *Kansas v. Colorado*, 206 U. S. 46. Congress has power to prohibit wharves in navigable streams throughout the United States only to the extent that such wharves obstruct navigation, and Congress can give the Secretary of War no greater power.

Here the Chief of Engineers not only found that the proposed structure would not obstruct navigation, and recommended that the permit be granted (R. 12, 46), but he reported to the Secretary that

> "* * * there has not been a single objection to the construction of the wharf from the standpoint of navigation." (R. 46.)

In the majority opinion below appears the following statement:

> "The Secretary may well have concluded that the structure of the wharf in question, a short distance

above a bridge costing millions of dollars, would so alter or modify the course of the stream as to result in damage to the bridge." (R. 70.)

This statement does not purport to be based on anything in the record, and it is directly contrary to the stipulation made at the opening of the case as follows:

> "At the opening of the case the following agreement was made by counsel: Counsel for the defendants admits that the construction of the wharf, fender piles, etc., as applied for which is involved in this case will not obstruct navigation, and says that the decision of the Secretary of War declining to authorize such construction was not by reason of any matter connected with navigation, but that *the only thing* that the Secretary had in mind was that the project was against public policy and particularly opposed to the program contemplated by the Crampton Act and the proposed George Washington Memorial Parkway." (R. 38, italics ours.)

The Crampton Act referred to is the Act of May 29, 1930, 46 Stat. 482. It provides for the creation of the George Washington Memorial Parkway to include the shores of the Potomac and adjacent lands from Mount Vernon to a point above the Great Falls on the Virginia side. It is fair to say that this parkway *may* include part of the relators' land, but it is not correct to assume as did the court below that the relators' land will undoubtedly be taken, for the Crampton Act expressly provides:

> "As to any lands in Maryland or Virginia along or adjacent to the shores of the Potomac within the proposed limits of the parkway that would involve great expense for their acquisition and are held by said commission not to be essential to the proper carrying out of the project, the acquisition of said lands shall not be required upon a finding of the commission to that effect." 46 Stat. 483.

In any event this development and the acquisition of any part of the relators' land by the United States is entirely in the future and perhaps in the distant future. There is no justification for a statement made at the conclusion of the majority opinion below that "ample funds" have been "appropriated under the parking act to acquire the lands adjacent to the river for parking purposes" (R. 72). On the contrary, although certain funds have been "authorized to be appropriated" by the Crampton Act, 46 Stat. 482, no funds have as yet been appropriated to our knowledge, and the Crampton Act expressly provides:

> "Such funds shall be appropriated as required * * * *Provided*, That no money shall be expended by the United States for lands for any unit of this project until the National Capital Park and Planning Commission shall have received definite commitments from the State of Maryland or Virginia, or political subdivisions thereof or from other responsible sources for one-half the cost of acquiring the lands in its judgment necessary for such unit of said project deemed by said Commission sufficiently complete, other than lands now belonging to the United States or donated to the United States." 46 Stat. 482, 483.

There is no evidence that any such "definite commitments" have been received from the State of Virginia. As far as we know, no such commitments are in prospect, and in the present depression it is fanciful to believe that any such commitments will be received in the near future. Meanwhile, the decision of the majority below is that the owners of the land are to be prevented from developing its natural use as a water front.

The Director of the National Park and Planning Commission testified that while the Secretary of War had the application for the wharf permit under consideration, the Director urged the Secretary to refuse the wharf permit because if the wharf permit were granted the Sun Oil Com-

pany would take the property and would build tanks thereon, which would increase the amount that the Government would have to pay for the property when condemned, but if the wharf permit were not given the Sun Oil Company would not take the property and would not build tanks, the result of which would be that when the Government acquired the property by condemnation it would not have to pay so much for it (R. 53, 54). *Of course, the Government may take the property at any time by condemnation, but we respectfully submit that the Secretary of War may not lawfully prevent the natural development of the property for an indefinite period until the Government determines that it is ready to take it.*

In a very similar case, Attorney General Wickersham gave as his opinion that in determining whether permission should be given for the erection of a dolphin off the coast of Santa Barbara, California, for the purpose of unloading oil from steamers, the Chief of Engineers and the Secretary of War should not consider the injury to an adjacent bathing beach by reason of oil which would be spilled from the dolphin, or any other similar reason not having direct relation to the navigable capacity of the waters and their use for interstate or foreign commerce. The Attorney General advised the Secretary of War that such consideration should not prevent the approval of the plan, provided it would otherwise have the approval of the Chief of Engineers and the Secretary. Considerations of space deter us from quoting at length from this opinion, which demonstrates that

> "* * * the statute in question restricts the authority of the Secretary of War to very narrow limits." 27 Opinions Atty. Gen. 284, 287.

There are many decisions to the effect that an administrative officer or board to whom application is to be made for a permit may not refuse to grant it because of matters

disconnected with the questions that the officer or board should properly decide in his or its discretion as a basis for granting or refusing the permit. In such cases mandamus will lie. For example, in *New York v. Department of Health*, 226 N. Y. 209, the Board of Health had refused to issue a license for a hospital for the reason that—

> "considerable damage would accrue to the surrounding property if the permit were issued."

It was held that this reason did not come legally within the scope of the discretion of the Board and the writ of mandamus issued. To the same effect are *Jackman v. Public Service Commission*, 121 Kan. 141; *People v. Robinson*, 126 N. Y. S. 546, 141 App. Div. 656; *Empire Home Furnishers v. White*, 256 N. Y. S. 451, 145 Misc. Rep. 285; *Nicodemus v. State*, 82 Okla. 152; *Coyne v. Prichard*, 272 Pa. 424; *Wright v. France*, 279 Pa. St. 22; *State v. Mayor*, 94 W. Va. 189.

The discretion conferred upon the Secretary of War by the statute was to ascertain whether the granting of a permit would obstruct navigation. He exercised this discretion and found that navigation would not be obstructed. There remained then only the ministerial duty to grant the permit. To compel the performance of this duty the writ of mandumus will issue. *Marbury v. Madison*, 1 Cranch 137.

II. The owner of land bordering the Potomac River in Virginia opposite the District of Columbia has the right to build a wharf if it does not obstruct or injure the navigation of the river.

This precise point has never come before this Court for decision. It has been established that the jurisdiction of the District of Columbia goes to the high-water mark of

the Potomac River on the Virginia shore. *Marine Railway Company v. United States*, 257 U. S. 47; *Smoot Sand & Gravel Corporation v. Washington Airport*, 283 U. S. 348. But these cases are in no way inconsistent with the contention that Virginia landowners have the right to build wharves which do not obstruct navigation, and they contain language which indicates an agreement with this view, for example:

> "As stated in 257 U. S. 64, Article 7 (of the Compact of 1785) gave the citizens of each State full property in the shores of the River adjoining their lands and the privilege of carrying out wharves * * *."—*Smoot Sand & Gravel Corporation v. Washington Airport, Inc.*, 283 U. S. 348, 351.

A. AT COMMON LAW.

It was assumed by the trial court (R. 23) and by the Court of Appeals (R. 67) that, because by the common law of England the construction of a wharf in navigable water was an invasion of the King's *jus privatum* and a purpresture which might be abated, the same rule applied in the Potomac, so that a wharf from the Virginia shore might be abated at any time by the sovereignty which owned the bed of the stream. This assumption overlooked the fact that conditions were so different in Colonial Maryland and Virginia that the common law in those Colonies differed from that of England.

Thus in *Shively v. Bowlby*, 152 U. S. 1, in referring to the right to build a wharf, this Court said:

> "The common law of England upon this subject, at the time of the emigration of our ancestors, is the law of this country, except so far as has been modified by the charters, constitutions, statutes *or usages* of the several Colonies and States, or by the Constitution and laws of the United States." (p. 14, italics ours.)

"The governments of the several Colonies, with a view to induce persons to erect wharves for the benefit of navigation and commerce, early allowed to the owners of lands bounding on tide waters greater rights and privileges in the shore below high water mark, than they had in England. But the nature and degree of such rights and privileges differed in the different Colonies, and in some were created by statute, while in others they rested upon usage only." (p. 18).

The navigable streams of Maryland and Virginia were great tidal rivers, in magnitude far beyond anything known in England, and the life of those Colonies was centered in plantations bordering these rivers, each plantation with its own wharf from which tobacco and other products were shipped to England. The wharf was a necessity of plantation life, and by usage in these Colonies the landowners bordering these tidal streams were permitted to build and maintain their wharves, so long as they did not interfere with navigation.

"Such luxuries as were desired, books, wines, silk and laces, were brought from London to the planter's wharf in exchange for his tobacco; * * *" *Virginia*, by John Esten Cooke, p. 371.

"The planter needed no port when ships from London or Bristol, Boston or Jamaica, brought wine, sugar, salt-fish, English and Dutch wares to his very door, and loaded tobacco and maise at his own wharf." *Maryland*, by William Hand Browne, pp. 159, 160.

"This is the Potomac of the landings—of the old wharves supported by the leaning piles and protected at their corners by the high cable-lashed clusters of stout oak; * * * of the clipper ships from England and the Spanish Main, * * * the schooners and sloops and gilling skiffs; of the long stretches of leisurely peace over an almost unbroken span of three hundred years. * * * The landings are frequent. * * *

> "The old landings themselves indeed reach out from the shores of yesterdays. * * * the square-rigged clippers from England bring luxuries and dainties to the planters and their dames; the landings bend and creak or straighten and steady under the tobacco cargoes; * * *" *Potomac Landings,* by Paul Wilstach, pp. 3, 9 and 10.

This difference between the common law of England and America is well recognized. For example, in a note in 40 L. R. A. 635, it is stated that in England there were several adverse rights to be considered in determining whether or not a riparian owner had a right to construct a wharf, first, the navigator's right to land his goods; second, the King's *jus privatum* in the soil covered by water; and, third, the *jus publicum* which was the right to have the water kept free from obstructions for the purpose of navigation. The note then continues:

> "In this country there was only the right of the riparian owner and the *jus publicum* to be considered. In the early days the navigable channels were in most cases ample, the need of wharves urgent, and the public funds deficient. So, by common consent, supplemented in some instances by legislation, the riparian owner was permitted to erect wharves, and his right to do so was unquestioned."

And this Court held in *United States v. River Rouge Co.,* 269 U. S. 411, 418,

> "It is well settled that in the absence of a controlling local law otherwise limiting the rights of a riparian owner upon a navigable river, *Shively v. Bowlby,* 152 U. S. 1, 40, he has, in addition to the rights common to the public, a property right, incident to his ownership of the bank, of access from the front of his land to the navigable part of the stream, and when not forbidden by public law may construct landings, wharves or piers for this purpose. * * *

"This right of a riparian owner, it is true, is subordinate to the public right of navigation, and subject to the general rules and regulations imposed for the protection of such public right."

In *Norfolk City v. Cooke*, 27 Grat. 430, the Court of Appeals of Virginia stated,

"These rights both *at common law* and by statute, are secured to the riparian owner, to erect wharves, piers, or bulkheads for his own use or the use of the public, subject only to such general rules and regulations as the legislature may prescribe; and the only limitation upon such right is, that navigation may not be obstructed, or the rights of others injured. *This is the common law rule.* * * * (Italics ours.)

"This right of the riparian owner is not a mere license or privilege, but is *property*, property in the soil, up to the line of navigability, though covered by water; for the wharf, pier or bulkhead, can only be built on the soil." (Italics are the court's.)

In *Baltimore & Ohio R. R. Co. v. Chase*, 43 Md. 23, 34, the Court of Appeals of Maryland said,

"*By the common law* it is well settled, that where land lies adjacent or contiguous to a navigable river * * * (the owner has the right to accretion). And in addition to this right by reliction or accretion, the riparian proprietor, whose land is bounded by a navigable river, whether his title extends beyond the dry land or not, has the right of access to the navigable part of the river from the front of his lot, and the right to make a landing, wharf or pier for his own use, or for the use of the public, subject to such general rules and regulations as the Legislature may think proper to prescribe for the protection of the rights of the public, whatever those rights may be. * * *

"These riparian rights, *founded on the common law*, are property, and are valuable, and while they must be enjoyed in due subjection to the rights of the public, they cannot be arbitrarily or capriciously destroyed or

> impaired. They are rights of which, when once vested, the owner can only be deprived in accordance with the law of the land, and, if necessary that they be taken for public use upon due compensation." (Italics ours.)

Thus, by the usage of over three hundred years in Maryland and Virginia, the riparian owner has been allowed to maintain a wharf into navigable water, and the highest courts of both states have declared that the riparian owner has such a right at *common law*; and that the right is property.

B. BY THE COMPACT OF 1785.

But whatever may have been the effect of the usage of Maryland and Virginia in Colonial days as to wharves, the right to build a wharf into the Potomac from the Virginia shore was expressly recognized and legalized as a property right by the Compact of 1785 between Virginia and Maryland, and has been maintained unimpaired by subsequent legislation down to the present time.

By the Compact of 1785 entered into between commissioners appointed by Maryland and Virginia, it was provided:

> "Seventh, The citizens of each state respectively shall have full property in the shores of Patowmack river adjoining their lands, with all emoluments and advantages thereunto belonging, and the privilege of making and carrying out wharfs and other improvements, so as not to obstruct or injure the navigation of the river * * *." *Maryland Laws*, Kilty, Vol. 2, Nov. 1785, Chap. 1.

This Compact was ratified by the legislature of Maryland, March 12, 1786, by an act which recited the Compact and thereafter provided:

"Be it enacted, by the General Assembly of Maryland, That the said compact is hereby approved, confirmed and ratified, and that as soon as the said compact shall be approved, confirmed and ratified, by the general assembly of the Commonwealth of Virginia, thereupon, and immediately thereafter, every article, clause, matter and thing, in the same compact contained, shall be obligatory on this State and the citizens thereof, and shall be forever faithfully and inviolably observed and kept by this government, and all its citizens, according to the true intent and meaning of the said compact; and the faith and honour of this State is hereby solemnly pledged and engaged to the general assembly of the Commonwealth of Virginia, and the government and citizens thereof, that this law shall never be repealed or altered by the legislature of this government, without the consent of the government of Virginia." *Maryland Laws*, Kilty, Vol. 2, Nov., 1785, Chap. 1.

The Compact was also ratified by the legislature of Virginia, on March 28, 1785, 12 Hening, Va. Stat., p. 50.

In 1789 and 1791, respectively, Virginia and Maryland ceded to the United States the territory which became the District of Columbia. In the Maryland act of cession there was a proviso as follows:

"* * * nothing herein contained shall be so construed to vest in the United States any right of property in the soil, as to affect the rights of individuals therein, otherwise than the same shall or may be transferred by such individuals to the United States, * * *" *Maryland Laws*, Kilty, Vol. 2, November, 1791, Chap. 45, Sec. 2.

The Virginia act of cession contained a proviso in practically the same language, 13 Hening, Va. Stat., p. 44, Sec. 2.

The Organic Act of the District of Columbia of 1801, 2 Stat. 103, D. C. Code, p. 449, provided:

> "That the laws of the State of Virginia, as they now exist, shall be and continue in force in that part of the District of Columbia, which was ceded by the said State to the United States, and by them accepted for the permanent seat of government; and that the laws of the State of Maryland, as they now exist, shall be and continue in force in that part of the said district, which was ceded by that State to the United States, and by them accepted as aforesaid."

In 1846 there was a recession to Virginia of the territory ceded by her to the United States, and this Act provided:

> "* * * all the rights and jurisdiction therewith ceded over the same, be, and the same are hereby, ceded and forever relinquished to the State of Virginia, in full and absolute right and jurisdiction, as well of soil as of persons residing or to reside thereon." 9 Stat. 35, 36.

In addition to the right of landowners on the Virginia shore of the Potomac to build wharves therefrom according to the common law of Maryland and Virginia prior to 1785, we maintain that after the Compact of 1785 such landowners had "full property in the shores of the Patowmack river adjoining their lands, and the privilege of making and carrying out wharves and other improvements so as not to obstruct or injure the navigation of the river," that this became the law of Virginia by the Virginia Statute of 1789 and the law of Maryland by the Maryland Statute of 1791, that it became the law of the District of Columbia by the Organic Act of 1801, adopting the laws of Virginia and Maryland, that while the property was within the District of Columbia no legislation purported to affect this right to build wharves from the Virginia shore, and that the Act of 1846 receding the territory to Virginia ended all possibility of Congress affecting the right to build such wharves.

> "The original state of things was not changed by the grant of Virginia and the regrant by the United States of the part of the District on the Virginia side." *Marine Railway Co. v. United States*, 257 U. S. 47, 63.

Virginia landowners on the Potomac opposite the District of Columbia thus have "full property in the shores * * * and the privilege of making and carrying out wharves * * * so as not to obstruct or injure the navigation of the river."

For an analysis of the decisions dealing with the river, including *Maryland v. West Virginia*, 217 U. S. 577; *Marine Railway Company v. United States*, 257 U. S. 47; *Smoot Sand & Gravel Corporation v. Washington Airport, Inc.*, 283 U. S. 348; and *Evans v. United States*, 31 App. D. C. 544, reference is made to the opinion of Mr. Justice Groner (R. 73-80).

III. The Relators as the owners of land in Virginia bordering on the Potomac River may maintain this action.

While the concluding paragraphs of the majority opinion below contain language which may leave the reader in doubt as to whether the relators are the owners of land bordering on the river, there is in fact no question on that point.

At the conclusion of the majority opinion the statement is made:

> "It was conceded in the argument in this court that notices had been posted upon the lands, and that action has been taken in the Supreme Court of the District of Columbia to determine the title to these lands." (R. 72).

It is true that long after the petition for mandamus was filed and shortly before the trial the Park and Planning

Commission passed a resolution that a part of the land belonged to the United States and posted some notices on the land (R. 56), a proceeding which could not affect the title and which the trial justice jocosely called "homesteading." (R. 56.) The record, however, does *not* show that any action has been taken in the Supreme Court of the District of Columbia to determine the title to these lands, the court below is mistaken in understanding that any such concession was made in the argument, and no such suit has in fact been filed.

The trial court expressly found in the opening paragraph of its opinion that the wharf was to be—

> "in the Potomac River on the Virginia shore adjacent to the land owned by the relators." (R. 19.)

The relators showed (R. 39, 40, 48) and the trial court so found (R. 19) that their predecessors in title had owned land bordering on the Potomac River, that there had been a gradual and imperceptible increase to the land either by alluvium or by a gradual, imperceptible receding or dereliction of the water.

> "The rule, everywhere admitted, that where the land encroaches upon the water by gradual and imperceptible degrees, the accretion or alluvion belongs to the owner of the land, is equally applicable to lands bounding on tide waters or on fresh waters, and to the King or the State as to private persons; and is independent of the law governing the title in the soil covered by the water." *Shively v. Bowlby*, 152 U. S. 1, 35.

> "* * * when a tract of land lies adjacent or contiguous to a navigable river or water, any increase of soil formed by the waters gradually or imperceptibly receding or any gain by alluvion in the same manner, shall, as a compensation for what it may lose in other respects, belong to the proprietor of the adjacent or contiguous land." *Giraud's Lessee v. Hughes*, 1 Gill & J. 249, 264.

The majority opinion below says that this suit is part of "a land speculation" and that the matters involved are "conditional, contingent, prospective and inchoate," for which reason the Court below holds that the writ may not issue.

There is no land speculation involved and the interest of the relators is a very real one. The present relators are the son and daughter-in-law (R. 42, 43) of Charles H. Greathouse, the former owner of the land, who had contracted to sell it to Sun Oil Company if a wharf permit could be obtained (R. 41). This contract provided that the application might be made by Greathouse "at his own option, either in his name or in the name of Sun" (R. 41). The application was made in the name of the Sun Oil Company (R. 47). That was the simple, natural way to make the application, inasmuch as the Sun Oil Company was going to use the wharf and the Sun Oil Company's engineers would naturally prepare the plans. On the contrary, it would have been somewhat underhanded for Greathouse to have made the application in his own name when he had theretofore contracted to sell the land to Sun if the permit were granted. The statement in the application that Sun owned the land was correct to the extent that Sun had contracted to buy the land if the permit were granted. The title and interest of the Sun Oil Company is inextricably involved with the title and interest of the relators. They both may be said to have title to the land, the Greathouses still holding legal title and the Sun Oil Company having an equitable title under its contract of purchase, *Pomeroy's Equity Jurisprudence*, 4th Ed., Vol. 1, Secs. 105, 368, *Story's Equity Jurisprudence*, 14th Ed., Vol. 3, Sec. 1612, subject only to the issue of the wharf permit to which it was entitled. The Chief of Engineers expressly found:

> "The Sun Oil Company has secured all the authority that is necessary to build its establishment on the shore in Virginia." (R. 46.)

The question of who owned the land or in whose name the application was made had nothing to do with the Secretary's denial of the application.*

The relators now own the land. If the permit is granted they can sell the land to the Sun Oil Company (R. 41). If it is not granted they cannot make the sale (R. 41). Under their contract with Sun Oil Company they must endeavor to secure the permit by such litigation as may be appropriate (R. 42). They are certainly interested in the land to which they hold legal title, in the contract of sale to which they are now parties, and in the application which was made for their benefit and the granting of which is a condition precedent to the sale of the land. We respectfully submit that the view taken by Mr. Justice Groner is the correct one where he said,

> "Appellants' property is useful only for wharf purposes, but that use gives it value. Without the permit the value is lost, and unless redress can be afforded here, it can be found no where else. The case is peculiarly one in which the writ should issue." (R. 82.)

Conclusion.

It is therefore urged that the decision of the Court of Appeals of the District of Columbia be reversed, with a direction that the writ of mandamus issue as prayed.

Respectfully submitted,

J. Harry Covington,
John Marshall,
Spencer Gordon,
Attorneys for Petitioners.

*The majority opinion seems to suggest that the permit was denied because "upon investigation" it appeared "that the Sun Oil Company was not the owner of the property" (R. 69). If this is what the Court meant, we respectfully submit that such a holding is not warranted by anything in the record, and is completely refuted by the stipulation frequently referred to in this brief which gave the Secretary's reasons for his decision (R. 38).